RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

JOHN B. CHAMPION *v.* ALONZO GORDON.

A paper writing worded thus:—"Philadelphia, November 22d 1869. The Commonwealth National Bank pay to H. Yerkes or order, one hundred and fifty (December 3d 1869) dollars. John B. Champion:"—stamped as a bill of exchange, and negotiated in the market before maturity; held to be a check, and not entitled to days of grace.

WRIT of error to the District Court for the city and county of Philadelphia.

Action of *assumpsit*. The plaintiff offered in evidence a paper as described in the syllabus, with a certificate of protest made on December 3d 1869. The defendant objected, on the ground that the paper was an inland bill of exchange, and had not been presented for payment at maturity, but had been prematurely protested. The court reserved the question, whether the paper was entitled to grace; and subject thereto, the jury found a verdict for the plaintiff. The court in banc gave judgment on the verdict, and the defendant sued out a writ of error.

Wiltbank and *Carpenter*, for plaintiff in error.—Whilst checks differ from inland bills in certain particulars, the paper offered in evidence did not so differ, and hence was not a check, but a bill; by the spirit of his engagement defendant was drawer and drawee, and an instrument so made has been adjudged to be an inland bill: 9 Porter, Ala. 76; 2 Metc. 58; such a bill is in Pennsylvania entitled to grace; the facts, that the paper was payable in the future, was stamped as a bill and negotiated in the market, favor this view; the question of acceptance or non-acceptance was not pertinent to the inquiry, and all mercantile paper in Pennsylvania should be comprised in two classes,—paper payable at sight, without grace, under the Act of 1857, and paper payable in the future, with grace, as at common law.

Patton, for defendant in error.

The opinion of the court was delivered by

SHARSWOOD, J.—The law merchant recognises clearly a distinction in many respects between checks in banks and ordinary bills of exchange. One difference is, that when the former are

payable on demand or at sight no days of grace are allowed. The same rule holds when they are post-dated: Byles on Bills 14, note; 3 Kent's Com. 104, note: *In re Brown*, 2 Story's Reports 502; *Daniels* v. *Kyle*, 1 Kelly 304; *Mohawk Bank* v. *Broderick*, 10 Wend. 405; *Salter* v. *Burt*, 20 Wend. 205; *Andrew* v. *Blackly*, 11 Ohio (N. S.) 89; *Westminster Bank* v. *Wheaton*, 4 Rhode Island 30. Whether it applies also to checks payable at a future day named, is a question upon which there is a contrariety of opinion and decision. Mr. Justice STORY says: "The argument pressed is that checks are always and properly payable on demand, and that when payable at a future time, they become to all intents and purposes inland bills of exchange. But I am not, by any means, prepared to admit the validity or force of this distinction; and no case has been cited which in my judgment satisfactorily establishes it. A check is not less a check, because it is post-dated and thereby becomes in effect payable at a future and different time from that on which it is drawn or issued. This is sufficiently apparent from the case of *Allen* v. *Reeves*, 1 East 435." That was the determination of a question arising under the Stamp Acts, and it was there held that a post-dated check was not a draft payable on demand but at a future day, and therefore liable to the duty. Judge STORY adds: "It (a check) is usually also made payable on demand; although I am not aware that this is an essential requisite. The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are (as it seems to me) that they are always drawn on a bank or banker; that they are payable immediately on presentment, without the allowance of any days of grace, and that they are never presentable for mere acceptance, but only for payment:" 2 Story's Rep. 512. He quotes Chancellor KENT as concurring in these views: 3 Kent 104, n.

The ordinary commercial form of a bill of exchange payable at a future day is at so many days' or months' notice after date or sight. An order so drawn, whether upon a banker or any other person, ought to be regarded as a bill with all the privileges and liabilities which by the law merchant are incident to a bill. The drawer by adopting this usual form must be held so to intend. So if an order be drawn on a merchant or other person not a banker, with whom the drawer keeps money on deposit subject to draft, payable at a future day named, there exists no reason why the same rule should not apply. But there is a good reason why there

should be a difference between an order so drawn upon a banker, which certainly must be presumed to be by a person who keeps money on deposit with such banker, subject to draft, and an order on a merchant or other person. If such an order drawn upon a bank payable at a future day named in it, must be considered as an inland bill of exchange, and not a check, then the payer or holder has the right to present it at once for acceptance, protest it for non-acceptance, and sue immediately the drawer. Should it be accepted, however, the funds of the drawer in the bank would necessarily be thereby tied up, until the day of payment. All the objects of directing payment at a future day would thus be frustrated. What the drawer undertakes is, that on a day named he will have the amount of the check to his credit in the bank. In the mean time, he wants the full and free use of his entire deposit. It is not denied that a post-dated check cannot be presented for acceptance. That is by implication payable on a future day. Why then is a check expressly so made payable to stand on different ground? In the case before us an ordinary printed form of a bank check was evidently used, and the day of presentment written in one of the blanks. This is the most convenient form, for it calls the attention of the cashier or paying teller to the fact, which he would be likely to overlook, if it were expressed only by the date. Nothing, I am told, is more common than such mistakes in the payment of post-dated checks, and depositors often thus find their account overdrawn, very much to their embarrassment. If we determine that an order like that before us is not presentable for acceptance before maturity, we settle the question. It is a check and not a bill of exchange. More than twenty years ago, the banks of Philadelphia, under the advice of their counsel, adopted this rule, and it has been their uniform practice ever since. The usage of the banks in the commercial metropolis of the state, ought to have great weight in determining a question of this character. It is perhaps quite as important that such usage should not be disturbed, as that the point should be decided abstractly or theoretically right. It was so held in 1866, in the District Court of Philadelphia, in *Lawson* v. *Richards*, 6 Phila. Rep. 179, a case in which the most eminent counsel at the bar was concerned for the defendant, and that determination was acquiesced in. Judgment affirmed.

I. In Pennsylvania the only statute germane to the subject of this decision is the Act of May 21st 1857, which provides that, "All drafts and bills of ex-

change drawn at sight shall be and become due and payable on presentation, without grace, and shall and may, if dishonored, be protested on and immediately after such presentation." In that state negotiable mercantile paper, exclusive of one species soon to be noted, not within the scope of this act, becomes payable three days after the lapse of the time named therein for its maturity. Drafts and bills of exchange, therefore, not drawn at sight, are there, in the language of merchants, entitled to grace.

The question in the principal case, then, was simply this, Was the paper discussed a draft or bill of exchange not drawn at sight?—in the solution of which it appears that two classes of tests were applied; one, of scientific and technical principles; the other, of considerations of intent,—the special intendment of the parties in interest, and the general intendment of the customs and usage of commerce. Independently of the uncertainty how far with propriety a practice, or custom, which has not been established by a jury, or a finding in equity, may be assumed to exist by a court of last resort, the authorities countenance this mode of settling the difficulty as in most instances the only wise and just mode. "In my judgment," said STORY, J., "it is far better that the doctrines of commercial jurisprudence should, from time to time, adapt themselves to the common usages and practices and understanding of merchants, and vary with the varying courses of business, so as at once to subserve public convenience, and to mould themselves into the common habits of social life, than to assume any artificial forms, or to regulate, by any inflexible standard, the whole operations of trade and commerce:" *In re Brown*, 2 Story 502. In that case he announced, as the *lex et norma* by which to expound a contract evidenced simply by a paper decided to be a check, the "usage of banks,"—the "understanding of parties to a check,"—and "the constant habit of business:" *Andrew et al.* v. *Blachly et al.*, 11 Ohio, N. S. 95. *Tassel* v. *Lewis*, Ld. Raym. 743. It cannot be denied, however, that the principle has very limited application, and does not cover cases of local custom or usage, being based rather upon the universal characteristics, and necessary effect, of the several kinds of mercantile paper, than upon any modification of their natural characteristics and effect by the conduct of those who deal in them. Such modification, when set up, must be proved as matter of fact; and must be shown to be within the rules by which valid customs are tested: *Bowen et al.* v. *Newell et al.*, 5 Sandf. 326; s. c. 2 Duer 585; 4 Seld. 190; 3 Kernan 290; or it must be made a part of the case, by the agreement of the parties: *Morrison* v. *Bailey*, 5 Ohio N. S. 13. In the case before us, probably the principle is carried as far as it may be with safety.

II. The establishment of a distinction between checks and inland bills of exchange seems to have been necessary to the decision of the principal case, and of those which support it; whilst, on the other hand, that distinction is denied by the authorities to which the principal case is opposed. In this, it was held specially, that Champion's order upon the bank was not a bill of exchange at all; and generally, that a check, though not drawn at sight, was not only not within the statutory provision above quoted, but beyond the principle by which bills not within that statutory provision were entitled to grace. No matter when dated, payable, expressly, only upon the lapse of time, though issued before maturity, and negotiated in the community, checks in Pennsylvania are not so entitled; and this, not because they make an exception to the rule of the common law of that state, concerning bills, but because,

technically, checks and bills differ radically in their character, and the rule has nothing to do with the former. When payable at sight they are not within the Act of 1857. Hence we find them constituting that species of mercantile paper mentioned at the opening of this note as unaffected by a principle which applies to all other negotiable mercantile paper upon which the statute does not operate: *Lawson* v. *Richards*, 6 Phila. R. 179; *Bank* v. *Wheaton*, 4 R. I. 31; *In re Brown*, 2 Story 502; contrà *Morrison* v. *Bailey*, 5 Ohio, N. S. 13; *Brown* v. *Lusk*, 4 Yerger 210; *Bradley* v. *Delaplaine*, 5 Harrington 305; *Bowen* v. *Newell*, 4 Seld. 190; (*Bowen* v. *Newell* was subsequently decided by the light of a general custom proved on a third trial: vide 3 Kernan 290; *Bradley* v. *Delaplaine* was adjudged at Nisi Prius, but has been followed since.)

III. The preliminary, or special point, that the paper in question was a check, was determined as a question of law, inasmuch as this was, as have been the other contests upon the issue, a case in which the contract, with its provisions, was not denied, whilst the legal effect of it, involving a construction of its terms, caused the doubt. The inquiry has been of a character altogether different when any one or more of those terms have been disputed, as when the defendant has alleged that, as part of the agreement, grace was to be allowed, and the plaintiff has thereupon joined issue; in which event a verdict has ended the controversy independently of the general law of drafts and bills: *Andrew et al.* v. *Blachly et al.*, 11 Ohio, N. S. 95. Such an issue of fact, of course, might arise in an action brought on a check drawn in the ordinary way; just as, in a suit upon a note at six months, a mutual stipulation that no grace at all should be claimed, might be pleaded, and constitute the sole question: and a decision of a court of appeals upon writ of error, in such a case, could establish no general principle of law as to grace, although whether or not grace in that instance was to be allowed, would be so adjudicated.

IV. Hence, in the classification of the authorities, those bearing upon contracts, the terms of which as to grace have been disputed, and which have been defined only by a jury, have been separated from those with which, relatively to grace, a jury has had nothing to do. There are then found, first, cases in which, solely *as matter of fact*, grace was or was not the claimant's right; second, cases in which, *as matter of law*, grace was due; and third, cases in which the law allowed no grace. The first of these classes is of no value in the premises: *Andrew et al.* v. *Blachly et al.*, *ante*. The second and third seem to have established the following general principles:

V. In the commercial world checks and inland bills of exchange are distinguishable; "and he who seeks to make them identical in all respects may unintentionally be producing an anomaly, instead of suppressing one:" STORY, J., *In re Brown*, 2 Story 502. Not that it can be denied that, in many respects, they are so much alike as, in certain contingencies, to be treated as identical: Chitty, Bills 16; *Boem* v. *Sterling*, 7 Term Rep. 423; *Grant* v. *Vaughan*, 3 Burr. 1516; 1 Bl. Rep. 485; *Cruger* v. *Armstrong*, 3 Johns. Cas. 9; *Murray* v. *Judah*, 6 Cow. 490; *Bank* v. *Spicer*, 6 Wend. 443. A check is an order upon a bailee of funds, either a bank or a banker, to transfer a named amount of the money held on deposit for the drawer, to the drawee, or to his assignee: *Conroy* v. *Warren*, 3 Johns. Cas. 261, 264; *In re Brown*, 2 Story 502; *Brown* v. *Lusk*, 4 Yerger 216; *Keene* v. *Beard*, 8 C. B. N. S. 380. It is called a check as constituting a special kind of order in use in the special class of bailment indicated; but it operates just as any other proper order

would operate between the owner of goods and the depositary of them. It is, in a sense, within the scope of the law merchant, because it is mostly used by merchants, and facilitates trade. It is negotiable, not by virtue of a relationship to mercantile bills, but just as certificates of deposit, dock-warrants, bills of lading, pass by assignment, by warrant of law, perhaps analogous to the law of bills, but special to itself: *Wright* v. *Campbell*, 4 Burr. 2046; *Lickbarrow* v. *Mason*, 2 Term R. 63; *Zwinga* v. *Samuda*, 7 Taunt. 265; *Lucas* v. *Dorrein*, 7 Taunt. 278; *Keene* v. *Beard*, 8 C. B. N. S. 372; *Eyre* v. *Waller*, 5 H. & N. 460; *Sewel* v. *R. R. Co.*, 9 C. B. 811. Its definition necessarily involves the idea of the actual custody of funds on the part of the bailee, in trust for the bailor; and necessarily limits the character of the bailee to that of a bank, or a banker; because those whose business it is to hold money on deposit are banks or bankers; and excludes any idea of his being, as such bailee, a party in trading operations. The bank which pays money over its counter, on the order of its customers, becomes no more a party thereby to its customers' transactions in the use of that money, than does the warehouseman who delivers bales of cotton on proper order to persons so entitled to carry them off. No bailee can claim time before relinquishing the thing bailed, on the ground that time is allowed to certain parties to bills of exchange before they must pay them. As well might a warehouseman demand three days of grace upon the presentation to him of an order for merchandise in his stores, as a banker when directed by his principal to surrender his money.

VI. Of course, as the owner of merchandise, so the owner of money, may give special orders to his agent; as, to deliver on a certain day in the future. But this would be a modification of the order at the discretion of the principal, not authorizing the agent to further modify it, by delaying his compliance for some days after the day named. He is bound to surrender the property at the time duly indicated by its owner. And it is only, as has been discerned in England, a question of policy, whether such orders for money should be allowed.

VII. Now it is because banks and bankers, besides being the mere bailees of money, have become, also, in respect of other funds or credits, parties in commercial transactions, and act as principals in the negotiation of papers not wholly unlike checks, that the difficulty has arisen. A bank or banker may legitimately make, accept, endorse, and be payee, on bills of exchange and promissory notes: and not rarely a bank or banker is called upon to honor drafts; in which event, of course, as it is in no sense a bailee, but a principal, in the transaction, just as any merchant would be, it is entitled to the privileges attaching to the character. And not rarely it acts, relatively to different affairs, in the character of bailee and of party with one and the same person. Hence the question may arise, in a given instance, whether the paper was of one or the other description indicated?

This depends upon the transaction. If it is manifested simply by the paper itself, as a question of law the court decides whether that paper is a mere order upon a bailee, or an inland bill of exchange. If facts are established together with the paper, then the court states the legal effect of all together. But if it decides that the paper is merely a check, it must, in the absence of statutory provision, decide that, by the law merchant, the doctrine of grace has no application thereto. And it is to be observed that, as the drawer can very well state whether he was drawing on a depositary, or otherwise, if he does not, and leaves all to the paper itself, the circumstance may make against him.

VIII. In the principal case, then, and

in all the cognate cases, the question has been, whether or not by the contract of the parties, the paper given was merely an order of the bailor of funds upon his bailee, in favor of a third party; or whether it was a draft by the former upon the latter, drawn as between merchant and merchant in a transaction to which the law of agency did not primarily apply. If it was a principal's direction to his agent, it mattered not at what time, whether present or future, compliance was directed; and although a statute, or the agreement of the parties, might have provided that some time should be allowed to elapse after the date stated, to enable the bailee to collect his principal's funds, and obey the command, yet such provision, though legal, would not have been upon the principle of grace in commercial law in the former instance, any more than in the latter; and the absence of such a provision would, of course, leave the contract beyond the scope of that principle.

Obviously, if a man gives another such an order upon his bailee as cannot be complied with till some day in the future, it is rational to conclude that he is not prepared to transfer his funds at once; and, consequently, that he secures time to himself with a view to being prepared in the interval. Whether such checks should not be frowned upon, as calculated to confuse the transactions of men, and induce complications in commercial law likely to prejudice honest dealers, is a grave, but merely collateral, consideration.

IX. Turning again to the principal case, it is found that of this doubt the plaintiff in error sought to avail himself. He argued that the paper, payable in the future, stamped as a draft, and negotiated in the market, was, in law, a bill of exchange; and urged that, as a matter of policy, whenever there was no agreement demonstrated in a special instance to make such an instrument a check, every order for money not immediately payable should be held to be a bill. He sought to reduce all mercantile paper in Pennsylvania to two classes;—paper within the statute of 1857, and paper without that statute. The main point which this would have involved, would have been the decision that, in the absence of a special agreement, a particular necessary to the definition of a check was that it was immediately payable. This was for some time held to be an essential characteristic of checks.

A suggestion of this nature was anticipated by Judge STORY, whose opinion in the matter of Brown was the most exhaustive which has yet been had upon the subject; and it was in the same way met upon presentation. If the doctrine was sound, papers thus to be considered bills of exchange were subject to the general rule whereby bills of exchange are presentable for acceptance, and protestable if not then accepted; a rule the observance of which is vital to the conservation of trade, and yet which no acute business man would deem applicable in cases of paper made as was Champion's, where a depositary was the drawee. To this argument, unanswerable if the facts assumed existed, there was opposed the assertion that, independently of general principles, the paper then in question had not been presented for acceptance; the point, therefore, had not arisen: and that, as was said by ERLE, C. J., in *Keene* v. *Beard*, 8 C. B. N. S. 380, for all that appeared to the contrary, the bank was not indicated as bailee, but as a trader, and may have been prepared to accept when applied to: an assertion which, coming as it did from the maker of the paper, was, in the absence of direct evidence on the head, equivalent to the declaration that the instrument itself indicated that with other features of bills as distinguished from checks, it possessed the special characteristic referred to, was presentable for acceptance, and would have been accepted if presented. It was this point

which was decided by the light of a local usage. "If we determine that an order like that before us is not presentable for acceptance before maturity, we settle the question. It is a check and not a bill of exchange. More than twenty years ago the banks of Philadelphia, under the advice of their counsel, adopted this rule, and it has been their uniform practice ever since. The usage of the banks in the commercial metropolis of the state ought to have great weight in determining a question of this character." By its tenor and effect, *as matter of fact*, the paper was not presentable for acceptance, and in contemplation of law the bank had not agreed to accept it. Had the usage of the Philadelphia banks not been relied upon, it seems reasonable to believe that the plaintiff in error would have prevailed.

X. It is not to be denied that the dealings between large institutions and merchants, which in the last century, and for some time in the present, were strictly transactions between principal and agent, not materially differing in effect from the operations of the Italian money-changers behind their benches in Lombard street, have altered with the development of complications in the affairs of men. Banks now are something more than the custodians of coin, not so secure if stored elsewhere. Their customers do not make deposits for safe keeping, but to obtain discounts, advances, and the intangible, but very appreciable, advantages of their countenance, and recommendation in business; and although they serve the agents of estates, and some heads of families, as depositaries merely, these classes of men are in an insignificant minority, and do not at all indicate their business sphere. They are powerful, and it is rather their province to bestow favors than, as public servants, to receive them. Nor can it be denied, if customs, general in the business world, although not established in any tribunal, are to be relied upon to modify the otherwise necessary effect of the instruments they trade in, that papers, called checks, and certainly designed to pass funds from the credit of one man to that of another, are constantly presented for acceptance, and so honored. The last rule in this connection of the New York banks is, that checks certified are to be marked, "Certified, payable through the clearing-house:" which "is really saying in effect," says the Journal of Commerce, "This draft is accepted, payable to-morrow through the exchanges." The plaintiff in error argued that, for all that appeared to the contrary, the bank upon which he drew might thus have accepted his draft payable in the future.

And there is, scientifically, no difference between certifying a check to be good, and accepting a bill of exchange. The relation in which the parties stand to each other determines the effect of the acts. In the first instance the bank says: he is entitled to draw upon me for the amount named; and renders itself primarily liable by this representation. In the second instance there is nothing more. And although we have, from long usage, assumed as necessary the existence of an actual deposit of funds in the vaults of an institution which certifies a check, and a transfer of those funds from one account to another upon the making of the certificate; and from our experience have found it unreasonable to go this far in the case of a commercial drawee, and have merely assumed that, if he has not now the funds he is answerable for them, and will in time procure them; this divergence is wholly immaterial, and induces no distinction whatever in principle. That Champion's order drawn upon a fellow-tradesman, would have been a draft, seems to be a part of the reasoning of the court in the principal case. That, drawn as it was, it might have been certified, is clear. And the duty to accept or certify depends upon whether or

not there is a contract, express or implied, to perform this duty in a given instance. The character of the paper may be a consideration beyond all this, depending upon whether he who accepts or certifies is a mere bailee or a principal party in the transaction.

XI. As the dealings of men have thus changed in their general characteristics, it is expedient to consider how far applicable to the new combinations are the old tests of commercial law. The scientific distinction between a check and a bill, if it is correctly stated at the beginning of this note, certainly remains to this day unaffected by those changes; but the modes by which in given instances that distinction used to be ascertained are no longer safe, or even available. A check, in commerce, may be payable in future; may be accepted; need not be drawn upon a bank or banker; need not represent at its date a sum of money actually on deposit with the drawee. But such a check, in law, would be a bill. If the fact was established, however, that such a check was, after all, merely an appropriation of funds held by a bailee upon deposit, the presumption of law that it was a bill would be modified, and the paper would remain a check. In the absence of a statutory provision for grace, such a check would be immediately payable at maturity. But the essential fact thus suggested would necessarily have to be admitted,—be found by a jury,—or be established by what is analogous to a verdict. Otherwise, at law, grace would be a matter of right.

It seems clear, then, that where there is no legislative provision for grace, a check is never entitled thereto; and that in every instance the question of grace must be settled by the special circumstances of the instance itself, that is to say, by the terms of the contract of the parties. The general principle is beyond discussion. If it does not operate in a special case, it is because it has no application, or because being *primâ facie* applicable, some statute has created an exception to it, or the agreement of the parties has validly excluded that case from its scope. But this does not lessen the frequent difficulties of deciding whether or not, in law, the paper examined is a check at all.

W.

Supreme Court of Errors of Connecticut.

DALE *v.* GEAR.[1]

The contract implied by law from a blank endorsement of a negotiable note before maturity by the payee, is as certain and absolute as if written out in full, and parol evidence is not admissible to contradict it.

This rule is applicable between endorser and endorsee, and it is not competent for the former to prove a cotemporaneous, naked agreement, that an unrestricted endorsement should be operative as a restricted one only in bar of an action by the latter.

But any fact or transaction which raises an equity between such parties, and shows it to be inequitable or a fraud to enforce the contract,—as that the endorsee

[1] We are indebted for this case to the courtesy of Mr. HOOKER, the Reporter.—EDS. AM. LAW REG.